L/ham **MAILED 5/12/03**

Decision 03-05-040 May 8, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation into the Gas Market Activities of Southern California Gas Company, San Diego Gas and Electric, Southwest Gas, Pacific Gas and Electric, and Southern California Edison and their impact on the Gas Price Spikes experienced at the California Border from March 2000 through May 2001.	Investigation 02-11-040 (Filed November 21, 2002)

ORDER DENYING REHEARING OF ORDER INSTITUTING INVESTIGATION 02-11-040

On November 21, 2002, the Commission issued Order Instituting Investigation (I.) 02-11-040 (OII). This OII is one of a number of actions we have taken in response to concerns about the extraordinarily high price of natural gas delivered to the California border in 2000 and 2001, particularly during the period between March 2000 and May 2001. We had ordered our Energy Division to prepare the OII in Decision (D.) 02-06-023, issued June 6, 2002 in the *Matter of the Application of Southern California Gas Company Regarding Year Six (1999-2000) under its Experimental Gas Cost Incentive Mechanism (GCIM) and Related Gas Supply Matters*.[1] Prior to the issuance of the OII, we had filed a complaint at the Federal Energy Regulatory Commission (FERC) and litigated against El Paso Natural Gas Company (El Paso) and its marketing affiliate for their manipulation of natural gas supplies to California, which was a substantial cause of the price spikes.

[1] In addition to ordering the OII, D.02-06-023 also extended SoCalGas' GCIM, with certain modifications.

The purpose of the investigation initiated by I.02-11-040 is to examine whether there are additional reasons for those natural gas price spikes. We will examine the gas market activities of the major gas utilities we regulate and the impact of those activities on the gas price spikes experienced during the above period.

I.02-11-040 established the terms of the investigation, which will be carried out in two phases. All Commission-regulated natural gas utilities are named respondents to the investigation as a whole. Respondents in Phase I are the Sempra Energy Companies, Southern California Gas Company (SoCalGas) and San Diego Gas & Electric Company (SDG&E). Southwest Gas, Pacific Gas and Electric Company, and Southern California Edison Company (Edison) are named respondents in Phase II. In addition, we have encouraged other nonjurisdictional entities and particularly affiliate trading entities of the regulated utilities to submit evidence and testimony related to the reasons for the natural gas price spikes that occurred during the period covered by the investigation.

On December 26, 2002, SoCalGas and SDG&E (applicants) jointly filed an application for rehearing of I.02-11-040. The sole issue raised by these applicants is the phasing of the proceeding; more specifically, they object to having been named as sole respondents in Phase I. Edison filed a response in opposition to the application. Applicants then filed a motion to file a response to the response, along with the response they sought to file.

Applicants argue that the decision to phase this OII and make them the sole respondents in Phase I is unfair and inconsistent with D.02-06-023, and thus arbitrary and capricious, and violates their rights to equal protection. They argue further that phasing is inefficient and could lead to inconsistent decisions. Neither argument presents sufficient grounds for granting rehearing.

I. OUR DECISION TO PHASE THE OII AND NAME APPLICANTS THE SOLE RESPONDENTS IN PHASE I.

Applicants contend that in D.02-06-023 in SoCalGas' Year Six GCIM proceeding, we "soundly rejected various arguments by Edison and the Southern

California Generation Coalition … that SoCalGas and its GCIM were somehow responsible for the high gas prices experienced by California in the winter of 2000-2001." (App/Rhg, p.2.) Applicants do acknowledge that despite this alleged conclusion, we decided to conduct a further state-wide investigation into the gas price spikes, agreeing with The Utility Reform Network (TURN), a party in the GCIM proceeding, that "this type of investigation is inappropriate in a SoCalGas-specific application proceeding." (D.02-06-023, p. 25.) Applicants then contend that in I.02-11-040, we completely changed course by creating two phases for this investigation and making applicants the sole respondents in Phase I, thus in effect creating a Sempra-specific investigation instead of an investigation involving all major trading entities. This, according to applicants, is an unfair and unsupported reversal, having been done without any additional evidence or input from the affected respondents and apparently for the sole reason of the Commission's own convenience. Applicants contend this is arbitrary and capricious, and violates the due process standard for administrative decision-making required under California law.

Applicants further argue that to require them to independently answer the complex questions set forth in I.02-11-040, without requiring input from all other respondents at the same time, places an undue fact-finding burden on them, which is not only unfair but potentially prejudicial. Setting up the proceeding this way, their argument goes, "may create the appearance that these two utilities somehow have more to do with the natural gas price spikes in 2000-2001 than the other respondents." (App/Rhg, p. 5.) Applicants argue that although we have already found to the contrary in D.02-06-023, the procedural structure of the OII casts "an unnecessary shadow over the entire OII." (*Id*.) Applicants also argue this structure gives an unwarranted advantage to Phase II respondents "by enabling them to craft responses and defenses in light of everything that takes place in Phase I." (*Id*.) Applicants conclude their argument by asserting that to the extent they are not treated the same as other respondents to the OII, we will be violating their state and federal rights to equal protection of the law.

Edison responds that applicants have failed to demonstrate legal error in our decision to conduct this investigation in two phases and to make applicants the sole respondents in Phase I. The thrust of much of Edison's argument is that SoCalGas, but none of the Phase II respondents, has been implicated in market manipulation in a number of different forums, and thus we are justified in looking at its activities first. Edison contends the OII explains in detail why we have placed SoCalGas and SDG&E in Phase I

Edison points out that the allegations that had been made in the GCIM proceeding by Edison and the Southern California Generation Coalition (SCGC) regarding SoCalGas' market manipulation are referred to in the OII (OII, p. 3.) Edison goes on to argue that SoCalGas has been strongly implicated in the gas price spikes issue in the El Paso proceeding at FERC, and by association, in the lawsuit filed against Sempra Energy and El Paso as well as other interstate pipelines and local distribution companies by the Nevada Attorney General. Both of these proceedings are discussed in the OII. (OII, pp. 5-9.) Edison further contends that in determining that an OII was warranted to examine the causes for the gas price spikes, we had not absolved SoCalGas from any involvement in that episode. The OII notes our November 2001 California Natural Gas Infrastructure Outlook Report[2] did not investigate any gas trading activity of any regulated utilities or other entities at the border, and explicitly states, "We open this proceeding [the OII] because gas trading activities of utilities under California jurisdiction as one possible cause of the gas price spikes experienced at the southern California border in the winter of 2000/2001 remain unexplored." (OII, p. 5.)

Applicants have not raised any arguments that would warrant a grant of rehearing. They appear not to grasp the significance of the fact that this OII was ordered as far back as D.02-06-023, in SoCalGas' Year Six GCIM proceeding. Thus despite what the record in that case allowed us to conclude regarding allegations by Edison and SCGC about SoCalGas' market manipulations, we still saw reasons to order this investigation.

[2] California Public Utilities Commission, 2002-2006, California Natural Gas Infrastructure Outlook, Natural Gas, November 2001.

This meant we were absolving no one from possible involvement in the gas price spikes problem. I.02-11-040, which initiated the OII, set forth its structure, which obviously had not been formulated at the time the investigation was ordered in June of 2002. There is nothing unlawful about our deciding to structure an OII in two phases, and nothing unlawful about starting with one set of respondents. We have great discretion to establish our own procedures and to structure our own proceedings as we deem appropriate. Applicants point to no authority that says otherwise.

It makes logical sense to begin this investigation with the two Sempra companies. We reiterate that it was in the course of our most recent examination of SoCalGas' GCIM that we became convinced that, regardless of the evidence in that case, further investigation of the gas price spikes issue should be pursued. As we discussed in the OII and as recognized by Edison, there were several other proceedings as well that led us in the direction of beginning the investigation with SoCalGas and SDG&E. While we cannot conclude at this time, as Edison argues, that SoCalGas has been implicated in any market manipulation or other wrongdoing concerning the gas price spikes, numerous questions have been raised in these different proceedings on which SoCalGas and SDG&E seem much more likely to have information than do the non-Sempra companies. It is wholly appropriate to begin this investigation by focusing on the parties who know most about the issues.

The procedural due process cases cited by applicants do not help their argument. *Ryan v. California Interscholastic Federation-San Diego Section* (2001) 94 Cal.App.4th 1048, 1069, talks about the due process right to be free from arbitrary adjudicative procedures. The case at issue here is an investigatory, fact-finding proceeding, not an adjudication, and the procedures we have established are not arbitrary. Applicants' other case, *Matthews v. Eldridge* (1976) 424 U.S. 319, 334, simply states a general standard for procedural due process, providing that it be flexible and afford such procedural protections as the specific situation requires.

Likewise, applicants' equal protection arguments are not persuasive. As an

initial matter, we do not believe that this case rises to the point where equal protection analysis should be undertaken. In the most important way, applicants are not being treated differently; all relevant parties are named respondents and all will have to answer the same questions. Putting SoCalGas and SDG&E first in the queue does not amount to a denial of equal protection.

Even assuming *arguendo* that equal protection analysis is called for here, the requirement of a rational basis for putting SoCalGas and SDG&E first is satisfied. In addition to what we have said in the OII, we have explained above why it makes logical and rational sense to start the first phase of our investigation with applicants as respondents.

II. THE ALLEGATION OF INEFFICIENCY.

Applicants contend that phasing the proceeding will lead to much inefficiency, since we will have to essentially go through the same exercise twice, once for them and once for the other respondents. Applicants point to the possibility that Phase II issues will arise in Phase I, thus necessitating litigation of such issues in Phase I and possibly also again in Phase II. Applicants argue that in addition to the inefficiency involved, this could lead to inconsistent decisions.

Edison responds by arguing that there is no inefficiency about "attempting to isolate the causes of the price spikes, beginning with an examination of the parties who have been implicated to this point." (Response, p. 10). Edison also argues that requiring all respondents to answer simultaneously would produce unwieldy and confusing results, and would likely increase the burden on all parties, as well as on Commission staff and other Commission resources.

We do not need to reach a conclusion on the relative merits of these arguments, as the issue of whether the procedures we have established will lead to inefficiency does not present a legal question. It thus does not afford any ground for granting rehearing.

III. APPLICANTS' MOTION TO FILE A RESPONSE TO EDISON'S RESPONSE.

Applicants filed a motion to respond to Edison's response, contending that while our rules do not provide for a response to a response, Edison had made two egregious factual errors that needed correcting. We deny the motion. Because we do not rely on any of Edison's factual recitations as a basis for denying the application for rehearing, it is not necessary to consider whether, under the circumstances alleged by applicants, it would be appropriate for us to grant applicants' motion to respond to Edison's response.

THEREFORE IS ORDERED that:

1. The application for rehearing of I.02-11-040 filed jointly by the Southern California Gas Company and San Diego Gas & Electric Company is hereby denied.

2. The motion filed by the above rehearing applicants to file a response to the response of the Southern California Edison Company is hereby denied.

This order is effective today.

Dated May 8, 2003, at San Francisco, California.

MICHAEL R. PEEVEY
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
LORETTA M. LYNCH
Commissioners